

In the United States
Circuit Court of Appeals
For the Ninth Circuit

MINORU YASUI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

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COLLIER, COLLIER & BERNARD
1220 Spalding Building
Portland, Oregon,
Attorneys for Appellant.

PAUL P. O'BRIEN,
CLERK

SUBJECT INDEX

	Page
Statement of the Pleadings and Facts Disclosing Court's Jurisdiction	1
Statutes, Executive Orders and Proclamations, the Validity of Which is Involved.....	3
Public Law No. 503, 77th Congress.....	3
Executive Order No. 9066.....	4
Public Proclamation No. 3, Western Defense Com- mand	6
Statement of the Case.....	11
Questions Involved on the Appeal.....	14
Specifications of the Assigned Errors to be Relied Upon	15
Argument	19
The Indictment does not charge that the defendant is an Alien Japanese, and therefore fails to state a crime and would not support a finding that the defendant is an Alien Japanese.....	19
The evidence in the case required a finding that the Appellant is a citizen of the United States.	21
Public Proclamation No. 3 of the Western Defense Command is void as depriving citizens of liberty and property without due process of law.....	29
Public Proclamation No. 3 is discriminatory and de- prives American citizens of the equal protection of the law	37
A regulation which forbids citizens of one ancestry or color to do things which citizens of another ancestry or color are permitted to do does not afford due process of law or equal protection of the law	41
Executive Order No. 9066 and Public Act No. 503 are void	43
Conclusion	44

TABLE OF AUTHORITIES CITED

Page

CASES

Bishop v. Vanderclock, 228 Mich. 299, 200 North-western 270	37
Buchanan v. Worley, 245 U.S. 60.....	41, 42
Collidge v. Long, 282 U.S. 582.....	39
Curriu v. Wallace, 306 U.S. 1, 14.....	39
Ex parte Milligan, 71 U.S. 2.....	31
Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 160	39
Hamilton v. Kentucky Distillery, 251 U.S. 146....	36
Harris v. U. S., 104 Fed. (2d) 41.....	20
Heiner v. Donnan, 285 U.S. 312.....	39
Home Building Ass'n v. Blaisdell, 290 U.S. 398, 426	36
Hyland v. Russell, 272 U.S. 253.....	36
Morrison v. California, 291 U.S. 82.....	21
Opinion of Justices, 207 Mass. 601, 94 Northeast-ern 558	41
Schlechter v. U. S., 295 U.S. 495.....	36
Sterling v. Constantine, 287 U.S. 378.....	35
Truax v. Corrigan, 257 U.S. 312.....	40
Truax v. Raich, 239 U.S. 35.....	41
U. S. v. Bernstein, 267 Fed. 295.....	32
U. S. v. Cohen Grocery Co., 255 U.S. 81.....	31
U. S. v. Standard Brewery, 251 U.S. 210, 220.....	20
U. S. v. Wong Kim Ark, 169 U.S. 649.....	20
U. S. v. Yasui, Record pages 13-52.....	37
Yick Wo v. Hopkins, 118 U.S. 356.....	41
Yu Chong Eng v. Trinidad, 271 U.S. 500.....	41

TABLE OF AUTHORITIES CITED

(Continued)

Page

TEXT BOOKS

Corpus Juris, Vol. 67, page 366, par. 56.....	31
Corpus Juris, Vol. 67, page 425, par. 186 et seq....	37
Moore, International Law, Vol. 3, Sec. 428, page 518	23
Moore, International Law, Vol. 3, Sec. 430, pages 543-546	24

CONSTITUTIONAL PROVISIONS, STATUTES, EXECUTIVE
ORDERS AND PROCLAMATIONS

Constitution of the United States, Fourteenth Amendment	14, 21
Constitution of the United States, Fifth Amend- ment	12, 16, 31
Executive Order 9066	2, 29, 43
O.C.L.A., Sec. 47-302.....	25
O.C.L.A., Sec. 47-306.....	25
O.C.L.A., Sec. 63-501	24
U.S.C.A., Title 8, Sec. 41.....	41
U.S.C.A., Title 8, Sec. 801.....	26
U.S.C.A., Title 18, Sec. 97a.....	1, 3

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APPELLANT'S BRIEF

**STATEMENT OF THE PLEADINGS AND FACTS
DISCLOSING BASIS OF COURTS'
JURISDICTION.**

The appellant was indicted in the District Court of the United States for the District of Oregon for a violation of Public Proclamation No. 3 of the Western Defense Command, and Public Law No. 503, 77th Congress, approved March 21, 1942. He entered a plea of not guilty and after trial was convicted and sentenced to pay a fine of Five Thousand (\$5,000.00) Dollars and be imprisoned for a term of one year. Public Law No. 503 is codified as Title 18, U.S.C.A., Section 97A, and the indictment is set forth on pages 2-5 of the record in this case.

At the conclusion of all the evidence in the case the appellant interposed a motion for a verdict and judgment of not guilty which raised the question of the sufficiency of the indictment for the reason that it was not charged that appellant was an alien Japanese but appeared therefrom that the appellant was a citizen of the United States of America. The motion raised further the question of the validity of the statute mentioned above and of Executive Order No. 9066, and of Public Proclamation No. 3 of the Western Defense Command, all of which are hereinafter set forth. The appellant contended not only that the indictment alleged but that the proof showed he was a citizen of the United States of America and that the laws and proclamations mentioned were void as to citizens of the United States of America.

The Court overruled the various motions of the appellant and held that the regulations were void as to citizens of the United States of America and held that the appellant was not a citizen of the United States of America but of Japan.

Exceptions were duly saved by the appellant to the ruling of the Court denying the defendant's motion for a verdict and judgment of acquittal and to the findings of the Court to the effect that the defendant was not a citizen of the United States of America but of Japan and the exceptions were allowed by the Court. (R. 88-90) Thereafter the appellant duly prosecuted this appeal.

The District Court of the United States for the District of Oregon had jurisdiction of the case pursuant to the provisions of Title 28, U.S.C.A. Sec. 41, Subdivision 2, and the Circuit Court of Appeals for the Ninth Circuit has jurisdiction upon the appeal pursuant to the provisions of Title 28, U.S.C.A.

**STATUTES, EXECUTIVE ORDERS AND PROCLAMATIONS, THE VALIDITY OF WHICH
IS INVOLVED.**

Public Law No. 503, 77th Congress, Title 18, U.S. C.A. Sec. 97A, is as follows:

“Whoever shall enter, remain in, leave, or commit any act in any military area or military zone which has been prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.”

Executive Order No. 9066, the validity of which is involved in this suit, was dated February 19, 1942, and appears in Vol. 7, No. 38, Page 1407 of the Federal Register of February 25, 1942. It reads as follows :

“Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104) :

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation,

food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restrictive areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder."

Public Proclamation No. 1, the validity of which is involved, is dated March 2, 1942, and establishes military areas Nos. 1 and 2. (R. 51-68.)

Public Proclamation No. 3, which was promulgated March 24, 1942, the validity of which is involved in this case, is as follows:

"HEADQUARTERS
WESTERN DEFENSE COMMAND
and FOURTH ARMY

Presidio of San Francisco, California

PUBLIC PROCLAMATION NO. 3

March 24, 1942.

TO: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

WHEREAS, By Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2 and Zones thereof, and

WHEREAS, by Public Proclamation No. 2, dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5 and 6 and Zones thereof, and

WHEREAS, the present situation within these Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof:

NOW, THEREFORE, I, J. L. DE WITT, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the Military Areas above described, or such portions thereof as are hereinafter mentioned:

1: From and after 6:00 A.M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits

of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew.

2. At all other times all such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than five miles from their place of residence.

3. Nothing in paragraph 2 shall be construed to prohibit any of the above specified persons from visiting the nearest United States Post Office, United States Employment Service Office, or office operated or maintained by the Wartime Civil Control Administration, for the purpose of transacting any business or the making of any arrangements reasonably necessary to accomplish evacuation; nor be construed to prohibit travel under duly issued change of residence notice and travel permit provided for in paragraph 5 of Public Proc-

clamations Numbers 1 and 2. Travel performed in change of residence to a place outside the prohibited and restricted areas may be performed without regard to curfew hours.

4. Any person violating these regulations will be subject to immediate exclusion from the Military Areas and Zones specified in paragraph 1 and to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: 'An Act to Provide a Penalty for violation of Restrictions or Orders with respect to Persons Entering, Remaining in, Leaving, or Committing Any Act in Military Areas or Zone.' In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment.

5. By subsequent proclamation or order there will be prescribed those classes of persons who will be entitled to apply for exemptions from exclusion orders, hereafter to be issued. Persons granted such exemption will likewise and at the same time also be exempted from the operation of the curfew regulations of this proclamation.

6. After March 31, 1942, no person of Japanese ancestry shall have in his possession or use or operate at any time or place within any of the Military Areas 1 to 6 inclusive, as established and defined in Public Proclamations Nos. 1 and 2, above mentioned any of the following items:

- (a) Firearms.
- (b) Weapons or implements of war or component parts thereof.
- (c) Ammunition.
- (d) Bombs.
- (e) Explosives or the component parts thereof.
- (f) Short-wave radio receiving sets having a frequency of 1,750 kilocycles or greater or of 540 kilocycles or less.
- (g) Radio transmitting sets.
- (h) Signal devices.
- (i) Codes or ciphers.
- (j) Cameras.

Any such person found in possession of any of the above named items in violation of the foregoing will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled 'An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone.'

7. The regulations herein prescribed with reference to the observance of curfew hours by enemy aliens, are substituted for and supersede the regulations of the United States Attorney General

heretofore in force in certain limited areas. All curfew exemptions heretofore granted by the United States Attorneys are hereby revoked effective as of 6:00 a.m., PWT, March 27, 1942.

8. The Federal Bureau of Investigation is designated as the agency to enforce the foregoing provisions. It is requested that the civil police within the states affected by this Proclamation assist the Federal Bureau of Investigation by reporting to it the names and addresses of all persons believed to have violated these regulations.

J. L. DEWITT

Lieutenant General, U. S. Army
Commanding"

STATEMENT OF THE CASE

The appellant was born at Hood River, Oregon, on October 19, 1916. His father and mother were both residents and inhabitants of that place, the father being engaged in business as a merchant and the mother as a housewife. Neither were in the diplomatic service of any country. (R. 77, 148-150.) The appellant's birth was recorded in the birth records of the State of Oregon at that time and his birth has never been recorded in any other place. The father continued to engage in business as a merchant and in farming pursuits at Hood River until he was interned after the declaration of war with Japan.

The appellant has never resided at any place except in the United States. When he was about eight years old his parents took him on a short trip to Japan to visit his grandparents, leaving in June and returning the following September. Except for this short vacation and for a portion of a day spent in Mexico, the appellant has never been outside of the United States of America. He has never received from or given to the Government of Japan any questionnaire or information as to himself.

The appellant was educated in the primary and high schools at Hood River. He entered the University of Oregon in 1933, started the study of law in 1936, received his Bachelor of Arts degree from the University of Oregon in 1937, and was graduated from the School of Law in June, 1939. In the meantime he had earned a commission as second lieutenant in the United States Army and on arriving at the age of majority he took an oath of allegiance to the United States of America and received his commission. He was admitted to the bar of Oregon in September, 1939, and practiced law at Hood River and Portland, Oregon, until April, 1940. He voted as an American citizen.

In April, 1940, the appellant secured employment in the office of the Consulate General of Japan at Chicago, Illinois. The necessary papers were filed with the Secretary of State wherein was set forth that he was an American citizen. He never took any oath of allegiance to Japan and his duties consisted of opening the mail, typing answers thereto, and making

speeches before civic clubs. His salary was \$125.00 per month. On December 8, 1941, he resigned his employment with the Consulate General and immediately tendered his services to the United States Army.

On the 28th day of March, 1942, the appellant violated the so-called Curfew Regulations contained in Public Proclamation No. 3. For this he was indicted and on the trial contended that the indictment was defective in that it failed to charge a crime and did not allege that he was an alien Japanese. He further contended that the proof showed he was a citizen of the United States of America and that the regulations which he was charged with violating were void as to citizens of the United States of America and more particularly as to him in that they deprived him of liberty and property without due process of law and failed to grant him equal protection of the law and illegally discriminated against him as a citizen of the United States of America and failed to grant him the privileges and immunities which attached to him as such. These questions were raised by a motion at the conclusion of all of the evidence of the case for a verdict and judgment of not guilty. The trial Court overruled the motion, holding that the regulations which the appellant was charged with violating were void as to citizens of the United States of America but holding that the appellant was not a citizen of the United States of America, but of Japan. The appellant saved exceptions to the action of the Court in denying his motion and objected and excepted to the findings of the Court that the appellant was a citizen of Japan and was not

a citizen of the United States of America, and objected and excepted to the Court finding the defendant guilty and to the imposition of any sentence against him.

The questions involved in this appeal arise by reason of the rulings and exceptions aforesaid. The questions involved are:

First: Is the indictment defective in failing to allege that the defendant was an alien Japanese?

Second: Does the evidence taken at the trial show that the defendant was a citizen of the United States of America?

Third: Does the evidence in the trial show, beyond a reasonable doubt, that the defendant was a Japanese alien?

Fourth: Does the finding of the court that the defendant is not a citizen of the United States, deprive him of his guaranty of citizenship under the Fourteenth Amendment of the Constitution of the United States?

Fifth: Does Public Proclamation No. 3, and particularly the provisions therein establishing hours or curfew and the regulations pertaining thereto, deprive the defendant of his liberty and property without due process of law?

Sixth: Does Public Proclamation No. 3, and particularly the provisions therein establishing hours of curfew and the regulations pertaining thereto, deprive the defendant of equal protection of the laws?

Seventh: Does Public Law No. 503, 77th Congress, deprive the defendant of his liberty and property without due process of law?

Eighth: Does Public Law No. 503, 77th Congress, deprive the defendant of the equal protection of the laws?

Ninth: Does Executive Order No. 9066 deprive the defendant of his liberty and property without due process of law?

Tenth: Does Executive Order No. 9066 deprive the defendant of the equal protection of the laws?

SPECIFICATIONS OF THE ASSIGNED ERRORS TO BE RELIED UPON.

The errors assigned and to be relied upon are as follows:

Assignment No. 1. (R. 218) The court erred in overruling the defendant's motion for a directed verdict of not guilty and for a verdict and judgment of not guilty for the reason and upon the ground that the defendant is and at all times has been a citizen of the United States of America and because the regulations which he is charged with having violated are void as to citizens of the United States of America and void as to citizens of United States of America of Japanese ancestry and particularly the defendant in that they deprive such citizens and the defendant of life, liberty and property without due process of law and in that

the regulations are discriminatory in contravention of the Fifth Amendment to the Constitution of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is and at all times has been a citizen of the United States of America.

Assignment No. 2: (R. 218) The court erred in finding that the defendant is not a citizen of the United States of America for the reason and upon the ground that the evidence in the case is beyond dispute that the defendant is and at all times has been a citizen of the United States of America and for the further reason and upon the further ground that the indictment does not charge that the defendant is an alien but alleges facts from which it appears that he is a citizen of the United States.

Assignment No. 3. (R. 219) The court erred in finding that the defendant was a citizen of Japan for the reason and upon the ground that there is no evidence in the case upon which such a finding can be based and for the further reason that the indictment does not charge that the defendant is a citizen of Japan or an alien but alleges facts from which it appears that the defendant is and at all times has been a citizen of the United States of America.

Assignment No. 4. (R. 219) The court erred in not finding that the defendant is and at the time of the commission of the acts charged in the indictment was and at all other times was a citizen of the United States

of America, for the reason and upon the ground that the evidence is beyond dispute that the defendant has at all times been a citizen of the United States of America and for the further reason and upon the further ground that there is no evidence that the defendant has ever been a citizen of any country other than the United States of America and for the further reason and upon the further ground that the indictment alleges that the defendant is a citizen of the United States of America.

Assignment No. 5. (R. 219-220) The court erred in overruling the defendant's objection to the imposing of any sentence against him for the reason and upon the ground that the indictment in the case does not charge that the defendant is or was an alien but alleges facts sufficient to show that the defendant at all times has been a citizen of the United States of America.

These assignments raise the following contentions of the appellant which will be presented in the argument in the order named.

First: The indictment fails to state a crime for the reason that there is no allegation that the appellant is an alien Japanese.

Second: The evidence in the case was insufficient on which to base a finding that the defendant was an alien Japanese but, on the contrary, required a finding that the defendant was a citizen of the United States of America.

Third: The finding of the court that the defendant is not a citizen of the United States of America deprives him of his guarantee of citizenship under the Fourteenth Amendment to the Constitution.

Fourth: Public Proclamation No. 3 of the Western Defense Command, and particularly the provisions thereof establishing hours of curfew and the regulations pertaining thereto, and Public Law No. 503, 77th Congress, insofar as it applies to the proclamation, are void as to American citizens of Japanese ancestry and particularly to the appellant, for the reason that they deprive such American citizens and particularly the appellant of liberty and property without due process of law.

Fifth: Public Proclamation No. 3 of the Western Defense Command, and particularly the provisions thereof establishing hours of curfew and the regulations pertaining thereto, and Public Law No. 503 as applied to the Proclamation, are void as to American citizens of Japanese ancestry and particularly the appellant, for the reason that they deny such American citizens and particularly the appellant of equal protection of the laws.

Sixth: Executive Order No. 9066 is void for the reason that it denies to American citizens, and particularly the appellant, due process of law and the equal protection of the laws.

ARGUMENT

The indictment does not charge that the Defendant is an alien Japanese and, therefore, fails to state a crime and would not support a finding that the defendant is an alien Japanese.

Public Proclamation No. 3 purports to require all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing within the geographical limits described to be within their place of residence between the hours of 8:00 P. M., and 6:00 A. M., which period is referred to as the hours of curfew. It is apparent from the proclamation itself that alien Japanese are considered as a class distinct from persons of Japanese ancestry, and that persons of Japanese ancestry are not included in the classification relating to alien Japanese.

The indictment does not charge that the defendant is a Japanese alien but the allegation is, "that Minoru Yasui is a person of Japanese ancestry: that he was born at Hood River, Oregon, on the 19th day of October, 1916." This indictment did not inform the defendant that he would be called upon to defend against the charge that he was a Japanese alien. On the contrary, citizenship being the rule and alienage the exception, the presumption would be, from the allegation of birth in the United States, that appellant is a citizen of the United States. To charge a crime, it would be necessary to state facts from which the court

could draw a conclusion, as a matter of law, that appellant is an alien Japanese.

An indictment must be direct and certain as to the crime charged and the particular facts and circumstances when such are necessary to a complete offense. All the material facts and circumstances embraced in the definition of the offense must be stated in the indictment and the omission of any essential element cannot be supplied by intendment or implication. (See *U. S. vs. Standard Brewery*, 251 U.S. 210, 220; 64 L. Ed. 229, 435; 40 S. Ct. 139.) Allegations of essential elements of a statutory offense are matters of substance and not of form and their omission is not aided or corrected by verdict. (*Harris vs. U. S.*, C.C.A. Mo. 1939, 104 Fed. (2d) 41).

The court cannot say from an inspection of the indictment that the defendant is charged with being an alien Japanese. On the contrary, it would appear by the indictment that the appellant is an American citizen. Inasmuch as the lower court found that Public Proclamation No. 3 was void as to American citizens of Japanese ancestry, it necessarily follows that to state a crime under Public Law No. 503, 77th Congress, and Public Proclamation No. 3, it would be necessary to allege that the defendant was an alien Japanese. Inasmuch as the indictment does not so allege it cannot be the basis of a finding that the defendant is an alien Japanese and does not in fact state any crime at all.

The evidence in the case required a finding that the appellant is a citizen of the United States.

The appellant was born in the United States of America at Hood River, Oregon, on the 19th day of October, 1916. (Government Exhibit 7. R. 77, 148.) At that time the defendant's father was engaged in business at Hood River, Oregon, as a merchant and his mother was a housewife and both of his parents were residents and inhabitants of that place. Neither of the parents were in the diplomatic service of any country. Clearly then, the defendant on his birth became a citizen of the United States of America. "All persons born * * * in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside." Amendment XIV, Constitution of the United States. A person born in the United States, of alien parents who are regularly domiciled in the United States and who are not engaged in diplomatic service, is a citizen of the United States. (See *U. S. v. Wong Kim*, (Ark.) 169 U.S. 649, 42 L. Ed. 890, 18 S. Ct. 456; *Morrison v. Cal.*, 291 U.S. 82, 85.)

The opinion of the trial court (R. 46-47), while admitting the fact of the appellant's citizenship by birth, says:

"By international law, however, he was also a citizen of Japan and subject of the Emperor of Japan. According to international law, also, he had, upon attaining majority but not before, the right of

election as to whether he would accept citizenship in the United States or give his allegiance to the Emperor * * *."

No authority is quoted in support of the first statement. In support of the second, cases are cited where children, born in this country of alien parents, were taken by the parents to their native land and where the children, by reason of years of residence in such land became subject to the jurisdiction thereof. A third case is cited where a person naturalized in this country returned to his native land and reassumed his allegiance to it. The appellant in the case at bar denies that by international law he was a citizen of Japan or a subject of the Emperor of Japan, denies that according to international law he had, upon attaining majority, the right of election as to whether he would accept citizenship in the United States or give his allegiance to the Emperor, and asserts that at all events, if he was required to make an election, he at all times elected to be and remain a citizen of the United States of America by repeated acts and by most solemn declarations.

No evidence was offered at the trial that the appellant was ever a citizen of Japan. No reference or authority was cited that by international law he was considered as such. Allegiance is a necessary concomitant of citizenship. Double allegiance arises from the conflict of two nations, each superior within its own borders. The conflict is obviated by the rule that the liability of the child to the performance of the duties of allegiance is determined by the laws of that

one of the two countries in which he actually is. Moore, *International Law*, Vol. 3, Sec. 428, p. 518. The cases referred to by the trial court deal with children born in the United States, who were later removed to the birth place of their parents. In these cases the foreign nation could assert its citizenship law against the individual by reason of the individual's continued residence within its borders. Such is not the case at bar, for the appellant and his parents have continuously resided within the United States of America.

It is a contemptible concession to the power of any foreign government to say that such government can command allegiance to it from a person not only born in the United States of America but a continual resident and inhabitant thereof. It is a pernicious doctrine which asserts that a child born in the United States, of alien parents regularly domiciled therein, who continues with his parents to remain a resident and inhabitant of the United States, owes any allegiance to the land of his parents or has an inchoate right of citizenship therein during his minority. It permits a foreign government to add a proviso to the Fourteenth Amendment to the Constitution of the United States of America. It demands of all citizens of the United States, born of alien parentage, duties of election heretofore unknown. No natural born citizen of of the United States of America can owe any allegiance to or have citizenship in any foreign government unless he has voluntarily expatriated himself in the manner provided by law.

It is unquestioned that the appellant was born on the 19th day of October, 1916, at Hood River, Oregon, (R. 77, 148) and therefore he reached the age of majority on October 19, 1937. (O.C.L.A., Sec. 63-501.) The record of his birth was filed with the Oregon State Board of Health and was never recorded in any other place. (R. 150.) His father continued in business at Hood River, Oregon, throughout the years and his mother continued to there reside as a housewife. The only time the appellant has been outside of the United States, with the exception of four hours spent in Mexico, was in 1925 when he was taken on a short vacation trip to Japan in the summer months. (R. 151-152.) He never resided in any foreign country. (R. 153.) He attended the public schools in Hood River and entered the University of Oregon in 1933. He received his Bachelor of Arts Degree in 1937. (R. 153-154.) While attending the University of Oregon he took a military course which was unquestionably *not* compulsory. He completed this course in June, 1937. *Inasmuch as he had not then reached the age of majority he was not granted his commission in the United States Army until December 1937, at which time he then, having reached the age of majority, took an oath of allegiance to the United States of America.* (R. 174) If an election as to citizenship was necessary, here it was made in the most solemn manner. When such an election is made it is final. (Moore, International Law, Vol. 3, Sec. 430, pp. 545-546.)

In June, 1939, the appellant completed his law course at the University of Oregon. He returned to

Hood River County and worked in the summer time as a ranch hand and, in September of 1939, passed the bar examinations and was admitted to practice in the State of Oregon. (R. 155.) To secure his license it was necessary that he be a citizen of the United States of America and that he take an oath of office to support the Constitution and laws of the United States. (Sec. 47-302 and 47-306, O.C.L.A.)

He never took an oath of allegiance to any country save the United States of America and exercised the rights of citizenship by voting in the State of Oregon. (R. 154, 157.) The appellant's parents are Methodists, (R. 196) and the only Japanese organizations with which he was connected were the Japanese Methodist Church and the Japanese American Citizens League. (R. 178, 196.)

After admission to the bar he practiced law until April, 1940. At that time the appellant secured employment as a secretary in the office of the Consulate General of Japan at Chicago, Illinois. Along with all other employees, he was required to be registered with the Secretary of State at Washington, D. C., and in his registration his nationality was given as United States citizen. (R. 59) His salary was \$125.00 per month and his duties consisted of opening and answering mail and making speeches before civic clubs. He had hoped to bring about better relations between the United States and Japan. (R. 181-182), did nothing detrimental to the United States of America, R. 191), and there is not a scintilla of evidence that dur-

ing the time he was employed with the Consulate General's office he did any act or said anything inconsistent with his citizenship in or allegiance to the United States (R. 151), and he did nothing which would bring about his expatriation. (R. 172-174, U.S. C.A., Title 8, Sec. 801.)

On December 8, 1941, the appellant resigned his position in the Consulate General's office because he felt that as a loyal American citizen he could not be working for the Japanese Consulate after the declaration of war. (R. 160). He immediately and repeatedly offered to go into active service in the United States army. (R. 84-86). Under date of March 28, 1942, (R. 85-86) he was notified that a physical defect, defective vision, would be waived for limited service and that he would be retained in the Infantry Reserve with eligibility for limited service only.

The appellant's employment by the Consulate General's office is one of the two things referred to in the opinion of the trial court as a basis for a finding that he was a citizen of Japan. Subdivision D of Title 8, Sec. 801, U.S.C.A., provides that a United States citizen shall lose his nationality by accepting or performing the duties of any office, post, or employment under the government of a foreign state or political subdivision thereof, *for which only nationals of such state are eligible*. It is not claimed that the duties of the appellant's employment could only be performed by Japanese Nationals. There were other American citizens employed in the department. How could the

citizenship in the United States, which the appellant had held for twenty-three years, be affected by his acceptance of this employment which was not confined to Japanese Nationals? As heretofore pointed out, the record in the case lacks any evidence that appellant's duties required him to do anything inimical to the interests of the United States of America or anything contrary to the oath of allegiance to the United States which he had taken over two and one-half years before. If he had been able to carry out his desire to preserve friendly relations between his country and Japan he would have earned the gratitude of all Americans. That he was unable to do so is no reason for damning him after the event by depriving him of the American citizenship which is his birthright.

The other circumstance referred to by the trial court is that the appellant's father, in 1940, received some recognition from the government of Japan. The only evidence in the record is that such recognition was given because of the work Mr. Yasui, Sr., had done in promoting better relations between the Japanese and Americans in the Hood River Valley. If the government contends that such recognition was granted for more sinister reasons and that a penalty should be visited on the son, it was in a position to produce what it claimed to be the facts. Instead, it produced nothing. The writers of this brief are not here called upon to defend the appellant's father. If we were we would first have to ask the nature of the charge, for none is suggested. Innuendo is not evidence. It is in the record, however, that on the night of December

8, 1941, the appellant received a telegram from his father reading as follows:

“As war has started your country needs your services as a United States Reserve Officer. I as your father strongly urge you to respond to the call immediately.” (R. 83)

The right to citizenship in the United States is precious to the appellant, but the question raised on this feature of the case goes far beyond his own personal interests. In this country are millions of persons born here of alien parentage who know no country but this. The appellant is one of them. These people, from early childhood, have learned in the schools to daily “pledge allegiance to the flag of the United States of America and to the country for which it stands, *one nation indivisible*, with liberty and justice for all.” They have been taught that the United States is the one country where all men are born equal and where no person will ever be discriminated against because of religion, race or color. They have learned that this, and this alone, is their country. To them, and remember that the appellant is one, double allegiance and the right of election between conflicting citizenships, are unknown. This country should reject any idea that a child born here of alien parentage, who remains here with his parents until reaching the age of majority, owes the faintest trace of allegiance to any foreign government or can throw off at will his allegiance to the country that has sheltered, protected, and educated him from the cradle to manhood.

The effect of the decision of the trial court is to deprive the appellant of the right of citizenship which he acquired by birth, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Public Proclamation No. 3 of the Western Defense Command is void as depriving citizens of liberty and property without due process of law.

The Fifth Amendment to the Constituion of the United States provides :

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Executive Order No. 9066, referred to in the indictment and heretofore set forth in full, after reciting that the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense materials, national defense premises and national defense utilities as defined by statute, authorized the secretary of war

and military commanders designated by him to prescribe military areas in such locations and of such boundaries as might be desired from which any or all persons might be excluded and subject to such restrictions as might be imposed upon the right of persons to enter, remain in, or leave such areas. Lt. General John L. De Witt was designated by the secretary of war to exercise for the Western Defense Command the authority granted by Executive Order No. 9066.

Claiming to act pursuant to the authority so vested in him, General De Witt, by Public Proclamation No. 1, on March 2, 1942, designated certain military areas and military zones. On March 21, 1942, Public Act No. 503 was passed by Congress and approved by the President. On March 24, 1942, Public Proclamation No. 3 was issued by General De Witt requiring all alien Japanese, all alien Germans, all alien Italians and all persons of Japanese ancestry residing within the limits of the military areas and zones theretofore established to be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period was designated as the hours of curfew.

The appellant, an American citizen, was arrested for being away from his place of residence during the so-called curfew hours. It will be noted that Executive Order No. 9066 contains a recital that the successful prosecution of the war requires every possible protection against espionage and sabotage. This is the purported excuse for the authority granted to the secretary of war and military commanders. Of neces-

sity, then, this must be the only excuse for the issuance of Public Proclamation No. 3, and the arrest of the appellant for violating it. In the final analysis the military commander ordered the appellant and others of his class to be confined to their homes during the hours specified without accusation or opportunity to be heard on a suspicion that he and others of his class might be inclined to espionage or to the commission of sabtotage. Every fundamental right embraced within the due process clause was violated and this for the sole reason that the United States is at war.

It will be noted that the first clause of the Fifth Amendment to the Constitution of the United States, that relating to indictment, etc., makes an exception in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. No such exception is reserved in the later provisions of the Amendment. The amendment does not say that no person shall be deprived of liberty or property without due process of law except in time of war, but does say, *without limitation*, that no person shall be deprived of liberty or property without due process of law.

A state of war does not suspend the operation of constitutional limitations. The existence of war does not suspend the guarantees of the Fifth and Sixth Amendments to the Constituion relating to personal equality, due process of law and taking private property for public use. (67 C.J. 366, Sec. 56, U. S .v. Cohen Grocery Co., 255 U.S. 81; Ex parte Milligan,

71 U.S. 2, U. S. v. Bernstein et al., 267 Fed. 295.)

In *ex parte Milligan*, *supra*, a citizen of the United States who had been tried, convicted and sentenced to death by a military court for conspiracy and subversive measures against the Federal government, applied for habeas corpus. He was a citizen of the State of Indiana which, although it had been previously invaded and was threatened with invasion, was not at the time under occupation by any hostile troops. The opinion deals exhaustively with the law of civil and military power and, after setting forth the provisions of the Fourth, Fifth and Sixth Amendments to the Federal Constitution, the court said:

“. . . . These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

“Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought

to be avoided. Those great and good men foresaw that troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law.

“The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of men than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.”

Answering the claim that the jurisdiction complained of was justifiable under the laws and usages of war the Court, among other things, said:

“If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military depart-

ments for more convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

“The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually render the ‘military independent of and superior to the civil power’—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irrenconcilable; and, in the conflict, one or the other must perish.

“This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to

human liberty are frightful to contemplate.

“If our fathers had failed to provide for just such a contingency, they would have been false to the trust imposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time has proved were essential to its preservation. Not one of those safeguards can the President or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.”

The *Milligan* case was cited with approval in *Sterling v. Constantin et al.*, 278 U.S. 378. The case was a suit to enjoin the Governor of the State of Texas, the Adjutant General of the State, and the Brigadier General of the Texas National Guard from enforcing certain military or executive orders. The executive and military orders were based on a proclamation of the Governor stating that certain counties were in a state of insurrection, tumult, riot, and a breaching of the peace and declaring martial law. The Court held that the allowable limitations of military discretion and whether or not they have been overstepped in a par-

ticular case are judicial questions, and, after citing the Milligan case and quoting from that portion of it which we have set out above, the Court sustained the issuance of an injunction against the defendant.

Emergency does not create power nor diminish constitutional restrictions. (See *Home Building Association v. Blaisdell*, 290 U.S. 426; *Schechter v. U. S.*, 295 U.S. 495) and the war power of the United States is subject to applicable constitutional limitations. (See *Hyland v. Russell*, 279 U.S. 253; *Hamilton v. Kentucky Distilleries*, 251 U.S. 146.

In the lower court the prosecution sought to justify Public Proclamation No. 3 by saying that it was merely a mild regulation requiring those affected by it to stay at home during certain hours and that the present state of the nation's affairs require that constitutional guarantees be redefined. These claims sound foreign to those who were raised to applaud Patrick Henry's immortal declaration that liberty is preferable to death. In the Milligan case, the military authorities at least gave him a trial but in the case at bar the military did not even go through that formality before condemning the appellant to imprisonment ten hours each day. This so-called mild invasion of the constitutional right to liberty was the first step step that led to the disgraceful situation where American citizens, charged with no offense except that of ancestry, are imprisoned behind barbed wire by the fiat of the military authority, while aliens of enemy countries are permitted by that same authority to be

at large. This is not a redefining of constitutional rights, it is an undermining of those most sacred to Americans. The trial court held that Public Proclamation No. 3 is void as beyond the power of the military authorities. The opinion of the court is set forth on pages 13-50 of the record, and is such a complete answer to the power claimed by the military authorities that the writers of this brief can add nothing to it. In the absence of a declaration of martial law the civil law and the constitutional guarantees are supreme. There is no middle ground between government by law and martial rule. (67 C.J. 425, Par. 186 et seq. *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 270.) The civil authorities, federal, state, and municipal, in the military zones established by the Western Defense Command are functioning as fully and completely as if the United States was not engaged in a war. All the courts are open, no part of these zones is or has been invaded by the enemy. In these circumstances if citizens are to be subjected to the arbitrary dictates of a military commander, then, as said in the *Milligan* case, *supra*, "republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the constitution"

Public Proclamation No. 3 is discriminatory, deprives American citizens of the equal protection of the law.

There is a more pernicious vice inhering in Proclamation No. 3 of the Western Defense Command. The

curfew provisions of the proclamation are directed against all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry. The proclamation is not directed against all citizens of the United States of America, nor against all citizens of the United States of America of German, Italian and Japanese ancestry. Of all American citizens, those of Japanese ancestry are arbitrarily selected by the military commander and placed in a classification with enemy aliens. No provision was made for a hearing by any American citizen of Japanese ancestry to determine whether such person was liable to commit acts of sabotage or engage in espionage. A greater insult to the loyalty of American citizens of Japanese ancestry could not have been devised. The insult was sweeping and complete.

As far as the writers of this brief are able to determine, this proclamation constitutes the first attempt on the part of any agency of the federal government to discriminate or legislate against a group of American citizens merely because of ancestry. It has always been the boast of this country that all citizens are equal before the law. For the first time in American history, persons born in the United States and citizens thereof are not treated as Americans. The theory is advanced that this nation which is supposed to be indivisible is composed of English Americans, Chinese Americans, German Americans, Italian Americans, Russian Americans, and foreign Americans of all classes. One of the vices of the proclamation is that

it fails to deal with the people as citizens and purports to suspect and punish them on the sole ground of ancestry.

In the lower court the prosecution contended and no doubt will contend in this court that the Fifth Amendment contains no equal protection clause. This, however, is a far different thing than saying that due process in and of itself does not protect citizens in their fundamental right to be dealt with equally with other citizens. This is recognized even in the cases which were cited by the prosecution. Thus, in passing upon the power of Congress to regulate commerce the court in *Currin v. Wallace*, 306 U.S. 1, 14, said:

“If it be assumed that there might be discriminations of such an unjust character as to bring into operation the due process clause of the Fifth Amendment, that is a different matter from a contention that mere lack of uniformity in the exercise of the commerce powers renders the action of Congress invalid.”

The restraint imposed upon legislation by the due process clause of the Fifth and Fourteenth Amendments is the same, *Heiner, Collector of Internal Revenue v. Donnan*, 285 U.S. 312; *Collidge v. Long*, 282 U.S. 582. No duty presses more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure the equality of right which is the foundation of free government. *Gulf, Colo. & Santa Fe Railway Co. v. Ellis*, 165 U.S. 160.

The essentials of due process were set forth in

Truax v. Corrigan, 257 U.S. 312, 333, 66 L. Ed. 254.

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general laws, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general laws which govern society. *Hurtado v. Cal.*, 110 U.S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislation may not withhold. Our whole system of law is predicated on the general fundamental plan of equality of application of the law. 'All men are equal before the law', 'This is a government of laws and not of men', 'No man is above the law', are all maxims showing the spirit in which legislators, executives, and courts are expected to make, execute and apply laws."

The prosecution cited a class of cases such as those dealing with the constitutionality of the milk act, the bituminous coal act, the tobacco inspection tax act, the social security law, the income tax law and the conscription act, as an argument that the United States government may adopt such classifications as it deems proper. We have no quarrel with any of these decisions, but would anyone say, for instance, that a court

would uphold the validity of a conscription act which said that no persons, except American citizens of Japanese ancestry, would be drafted into the United States army? The distinction is so fundamental that a mere statement of it would seem to show the inapplicability of the cases cited by the government.

All persons within the jurisdiction of the United States shall have the same right in every state and territory. . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to ^{like} ~~light~~ punishments, penalties, taxes, licenses and exactions of every kind, and no other. 8 U.S.C.A., Par. 41. A regulation which forbids citizens of one ancestry or color to do things which citizens of another ancestry or color are permitted to do, does not afford due process of law or equal protection of the law. *Buchanan v. Worley*, 245 U.S. 60; *Truax v. Raich*, 239 U.S. 35; *Yick Wo v. Hopkins*, 118 U.S. 356; *Yu Chong Eng et al. v. Trinidad et al.*, 271 U.S. 500. *Re Opinion of the Justices*, 207 Mass. 601, 94 N.E. 558.

The case of *Yick Wo v. Hopkins*, *supra*, involved the invalidity of ordinances of the city of San Francisco regulating the location and operation of laundries. Under the ordinances any persons seeking to operate a laundry were required to obtain a license from a board of supervisors. The operations of the supervisors under these ordinances was such that a large number of Chinese were denied the right to conduct laundries, while people of other nationalities in

similar circumstances were granted licenses. Mr. Justice Mathews, in the course of his opinion, said:

“They” (the ordinances) “seem intended to confer and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but as to persons”. . . .

“The power granted to them is not confined to their discretion in the legal sense of the term, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint.” Page 306.

“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the constitution.” Pages 373-4.

In *Buchanan v. Worley*, *supra*, the court said:

“That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration may be freely admitted. But its solution can not be promoted by depriving citizens of their constitutional rights.”

The rule was succinctly stated in *Re Opinion of the Justices supra*, as follows:

“The fact that a man is white, or black, or yellow, is not a just and constitutional ground for making certain conduct a crime in America, when it is considered permissible and innocent in a person of a different color.”

Executive Order No. 9066 and Public Act No. 503 are void.

From what has been said as to the unconstitutionality of the Public Proclamation No. 3, it necessarily shows that executive order No. 9066 and Public Act No. 503 are unconstitutional and void. Executive Order No. 9066 purports to authorize the proclamation and Public Law No. 503 to punish a violation of it. No executive order can authorize an unconstitutional order and no law can justify the punishment of a person for violating such an order.

This order grants to a military commander arbitrary authority over the actions of every person within the military areas to be defined. If the military proclamations were directed against the public generally, popular opinion would probably keep the unconstitutional fiats within some limits. When the power granted to the military, however, is construed to permit discrimination among citizens because of ancestry the usual results follow the grant of such arbitrary power. It is for this reason that we find thousands of innocent men, women and children today imprisoned

in stockades for no reason other than that they were unable to choose the ancestry of their parents.

CONCLUSION

The writers of this brier are not unaware of the fact that here and there among the thousands of American citizens of Japanese ancestry there may be found a few who might betray the land of their birth. Likewise, there are undoubtedly renegades among the German aliens and Italian aliens who are permitted to be at large by the same military authority which confines Japanese citizens and there no doubt are those who would betray this country who can trace their ancestry to four and five generations of American citizens.

The solution of such a problem as said in *Buchanan v. Morley*, *supra*, cannot be promoted by depriving citizens of their constitutional rights. The attack on Pearl Harbor was a great act of treachery which should be repaid in the American way and not by petty acts of injustices or by stripping American citizens of their most precious heritage. The appellant has asked for the opportunity to serve this country, the land of his birth and to die for it if necessary. He, and thousands like him, who have committed no offense indeed, who have intended none, should not be treated as criminals.

Respectfully submitted,

COLLIER, COLLIER & BERNARD,
E. F. BERNARD,

Attorneys for Appellant.

